The Next Phase for Dispute Resolution in Law Schools: Less Growth, More Change

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Law schools in the United States now treat dispute resolution as a regular offering. Dispute resolution, in fact, occupies a place roughly equivalent to tax or administrative law, according to Michael Moffitt's new research on course offerings and faculty composition.[1] Moffitt notes that this change has been in place for a decade—perhaps signaling a new status quo.

Dispute resolution faculty strategized, beginning roughly 25 years ago, on how to expand dispute resolution's toehold in law school teaching.[2] For many of these professors, described in 1984 as exuding a "pioneering" spirit,[3] Moffitt's findings in this symposium issue represent the achievement of a goal. Other professors who sought to teach dispute resolution to every law student [4] have reached a plateau in the climb to greater heights.

If the past 25 years represented the "newcomer-to-mainstream" phase in dispute resolution teaching, the symposium authors open a window into what may be the next phase. Their focus seems to be change, even more than

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[1] Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25 (2010).

[2] *See, e.g.*, Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 610–14 (1998); Leonard L. Riskin and James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989) (Riskin's focus was on placing within a variety of law school courses); Nancy H. Rogers, *No Panaceas, Only Promising Avenues: Frank Sander's Legacy for Dispute Resolution in Law Schools*, 22 NEGOTIATION J. 459, 462–63 (2006); Sarah R. Cole, Nancy H. Rogers, & Joseph B. Stulberg, *Sustaining Incremental Expansion: Ohio State's Experience in Developing the Dispute Resolution Curriculum*, 50 FLA. L. REV. 667, 671–77 (1998); Frank E.A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229, 236 (1984); Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 693–94 (1998).

[3] Frank E.A. Sander, *supra* note 3, at 236.

[4] *Id.*; *see also* Leonard L. Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259, 263 (1984).

continued growth. Some teaching changes stem from modifications in dispute resolution practice,[5] the focus of two of the symposium articles.[6] Some change may be intentional. Other change, such as a greater focus on teaching dispute resolution skills rather than law and policy, may be an unintended consequence.

Two teaching-related questions permeate the symposium articles. First, how should dispute resolution faculty help law schools prepare graduates to be "good lawyers," lawyers-wise and adept at the human, in addition to the purely analytical, side of lawyering? Second, how should dispute resolution practice and teaching change in light of technological advancements?

Some parts of the "good lawyer" rationale sound familiar to dispute resolution faculty. Tony Kronman, Mary Ann Glendon, and others express concern that lawyers will fail to fulfill a pivotal societal role as wise counselors—a role played historically by lawyers like Abraham Lincoln who solved problems with sound judgment and devoted themselves to the common good.[7] Overlapping with the "wise counselor" literature, the skills initiative, exemplified in 1992 by the MacCrate Report, and more recently by the Carnegie Foundation Report and the Clinical Legal Education Association Report, focuses on producing graduates who can negotiate, solve problems, and develop options, among other skills.[8] The wise counselor and skills strains of the good lawyer movement both advocate a role for law

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[5] For an article on the phases and future of dispute resolution practice, see Frank E.A. Sander, *Ways of Handling Conflict: What We Have Learned, What Problems Remain*, 25 NEGOT. J. 533 (2009).

[6] Benjamin G. Davis & Keefe Snyder, *Online Influence Space(s) and Digital Influence Waves: In Honor of Charly*, 25 OHIO ST. J. ON DISP. RESOL. 201, 212–41 (2010); David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO ST. J. ON DISP. RESOL. 105 (2010).

[7] MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 107 (1994); ANTHONY J. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 2–5 (1993); Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 595–602 (2009) (citing numerous other articles on this point).

[8] *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. (the "MacCrate Report"); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7 (2007), *available at* http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf (the "Carnegie Report"); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 11–37 (2007) (the "Clinical Legal Education Association Report").

schools because of a change in law practice, in part.[9] Proponents of the good lawyer movement blame the business pressures of practice (and more recently, the smartphone) for squeezing out mentoring time as well as the time for lawyers to serve the common good.[10] A strong dose of good lawyering instruction during law school might stimulate an appetite for self-development both in terms of serving the common good and being adept at the human side of lawyering, under this viewpoint.[11]

Several symposium authors offer to help the good lawyer advocates reach their goals. The authors focus on the skills aspects of some dispute resolution courses, rather than on the legal or policy aspects. Frank E.A. Sander suggested this incidental, but important, role for dispute resolution teaching 25 years ago, noting, "[P]erhaps a study of alternative methods will help not only to broaden the student's perspective on the vast dispute resolution panorama but will also strengthen the human aspects of legal education."[12] Students learn a number of the skills listed in the Clinical Legal Education Association and Carnegie Reports in their dispute resolution classes.[13] Similar to the lawyering skills initiative argument, the dispute resolution curriculum argument has been that law schools should not trust their graduates to lawyer mentoring as a way to learn these skills and a problem-solving approach.[14]

The symposium authors offer new insights related to joining the good lawyer movement. Phyllis E. Bernard explains how the lawyer skilled at the human side of lawyering can act as a bridge in a diverse society, serving the common good while practicing law.[15] She argues that students can learn to bring people together across cultures when they learn to mediate because the two activities require the same skills.[16] Bernard paints an appealing picture at

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[9] Clinical Legal Education Association Report, *supra* note 8, at 26–27; Carnegie Report, *supra* note 8, at 127–28; KRONMAN, *supra* note 7, at 375–76.

[10] Clinical Legal Education Association Report, *supra* note 8, at 26–27; GLENDON, *supra* note 7, at 12, 37, 107–08.

[11] Clinical Legal Education Association Report, *supra* note 8, at 8, 77; KRONMAN, *supra* note 7, at 375–76; Carnegie Report, *supra* note 8, at 3–4, 127–28.

[12] Sander, *supra* note 3, at 236.

[13] Clinical Legal Education Report, *supra* note 8, at 77–78; Carnegie Report, *supra* note 8, at 111–14.

[14] *See, e.g.*, Riskin, *supra* note 3, at 590; Albert M. Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution*, 34 J. LEGAL EDUC. 237, 238 (1984).

[15] Phyllis E. Bernard, *The Lawyer's Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (With Thanks to George Lakoff)*, 25 OHIO ST. J. ON DISP. RESOL. 165 (2010).

[16] *Id.* at 182–201.

a time when some individuals worry about national division on lines of ethnicity, race, and religion.[17]

John Lande and Jean Sternlight argue that law schools and faculty should look to dispute resolution to help implement their lawyering skills initiatives.[18] They propose a variety of steps, including a low-cost approach for law schools with few resources—interested faculty could work dispute resolution segments into their courses, assisted by their dispute resolution colleagues.[19] To increase integration of skills teaching, dispute resolution faculty could teach non-dispute resolution skills in their dispute resolution courses.[20] Adding to the coordination, students could document their skills development across courses through on-line student portfolios.[21] Moffit might label this the "germs" model of incorporating dispute resolution into the curriculum in the sense that a series of individuals decide to teach dispute resolution in their existing courses and "infect" the students' learning with it.[22] Lande and Sternlight celebrate the potential educational impact of multiple messages about dispute resolution and other lawyering competencies.

Deborah Merritt displays the true mediator spirit in pointing out the confluence of all interests if law schools adopt a law student portfolio approach.[23] Merritt suggests that the student learns more by becoming active in selecting learning opportunities.[24] The student also advances career opportunities by being able to demonstrate proficiency.[25] Students will ask

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[17] *Id.*; *see, e.g.*, Eric Holder, Remarks as Prepared for Delivery by Attorney General Eric Holder at the Department of Justice African American History Month Program (Feb. 18, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-090218.html; Jonathan Rieder, *Introduction* to THE FRACTIOUS NATION? UNITY AND DIVISION IN CONTEMPORARY AMERICAN LIFE 1, 10–11 (Jonathan Rieder & Stephen Steinlight eds. 2003); Paul Starr, *Stable Fragmentation in Multicultural America*, *in* THE FRACTIOUS NATION? UNITY AND DIVISION IN CONTEMPORARY AMERICAN LIFE 206, 215 (Jonathan Rieder & Stephen Steinlight eds. 2003).

[18] John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Cirriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 249 (2010).

[19] *Id.* at 278–91.

[20] *Id.*

[21] *Id.* at 291–92.

[22] Moffitt, *supra* note 1, at 68–71.

[23] Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. 7 (2010).

[24] *Id.* at 11–15.

[25] *Id.* at 17–20.

about adding course components in the skills they want to learn.[26] Dispute resolution faculty will also achieve their goals because law schools and faculty will want to accommodate their students' desires to become proficient in the skills of negotiators and mediators.[27] Law schools will find it feasible to require some core competencies of students, because these can be taught as components of existing courses or achieved through internships and extra-curricular activities.[28]

Technological advancement may speed the movement to more pervasive dispute resolution teaching, and skills training generally, by removing the need to teach in costly small sections. [29] Kathleen Goodrich and Andrea Kupfer Schneider explain how an interactive videogame provides rich experiential learning in a variety of lawyering skills.[30] As videogames proliferate, so does the potential to provide experiential student skills instruction in large classes.

Technological advancement will also change dispute resolution practice, and, as a result, the law school preparation for it. David Allen Larson provides startling, but intriguing, evidence that consensus builders can use artificial intelligence for its relational and emotional abilities, not exclusively for memory and analysis.[31] The future Larson paints foreshadows changes in teaching. Should faculty already be teaching students to program their computer-generated figures, or "avatars," to demonstrate concern though their body language and tone at particular times? Should dispute design courses include ways to reduce expense through on-line venting before negotiations begin?[32]

Technological advances will also raise new legal and policy issues. Should laws imposing qualifications on mediators preclude the use of a robot mediator? Are requirements for mediator warnings met if done orally by an avatar?

Benjamin G. Davis and Keefe Snyder suggest another thorny set of technology-generated policy issues. They describe how on-line

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Regarding the tendency and perceived need to teach skills in smaller sections, see the Carnegie Report, *supra* note 8, at 93–94.

[30] Kathleen Goodrich & Andrea Kupfer Schneider, *The Classroom Can Be All Fun & Games*, 25 OHIO ST. J. ON DISP. RESOL. 87 (2010).

[31] Larson, *supra* note 6.

[32] *Id.* at 157–61.

communication circumvents established communication patterns.[33] The new field of on-line deliberation also permits broader stakeholder education and participation in public policy discussions.[34] Fairness issues arise, nonetheless, because some have greater access to on-line space and some formats favor the educated participant.[35]

The emerging legal and policy issues underscore the point that teaching dispute resolution should include more than skills training. Would more trained mediators and litigators have averted the increase in litigation costs over the last century? Does a lack of skilled negotiators explain why few employers offered internal dispute resolution programs until recently? Society is served by lawyers who understand the legal issues involved in drafting mediation clauses and how to design a dispute resolution program for a client that will be a balanced process for all stakeholders.

Are there inconsistencies in the authors' goals? Is the alignment of the goals to deepen dispute resolution learning with the good lawyer initiative consistent with the continued desire to help future lawyers prepare to handle the legal and policy issues that lie ahead? Said another way, will dispute resolution faculty be more drawn to teach what law schools and students measure? The new outcome-based learning measurements could be linked to analytical and legal learning as well as skills.[36] Law schools, nonetheless, may look to dispute resolution teaching primarily to meet goals for skills learning since they offer many courses on law and policy.

This symposium marks both the acceptance of dispute resolution as an academic field and the beginning of a period of change in dispute resolution teaching. The symposium authors join with their colleagues in introspection about the best ways for law schools to prepare future lawyers. In the next phase of dispute resolution teaching, faculty will debate less about bigger and more about better.

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[33] Davis & Snyder, *supra* note 6, at 217–32.

[34] *Id.* at 237–41.

[35] *Id.* at 232, 239–42.

[36] For a recommendation of this see, Clinical Legal Education Report, *supra* note 8, at 73–75.